

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 397.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
APPELLANT,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE
OF MICHIGAN.

Criticisms by Appellee's Counsel on Statements of
Fact in Mr. Butterfield's Brief on Undervaluation,
&c.

We call attention to the following errors in statements of fact in Mr. Butterfield's brief, confining the criticism to items requiring reference to the record and which are not specifically covered by our brief.

1. *Admissions of Undervaluation in 1901 and 1902.*

(a.) Mr. Butterfield's brief asserts (p. 14) that the 1902 report of the board of State tax commissioners contains the statement that "they (*meaning the local assessors*) rarely claimed that assessments of property had been made at cash

value, as the law clearly and forcibly directs, but in fact admitted the prevalence of the plan of assessing property at a percentage of its value," etc. (The italics above are our own.)

The statement that the testimony referred to relates to the local assessors is clearly an error. The record does not so state (R., 146). The reference in the record is to page 36 of the 1902 report of the tax commission. The entire of this report is not printed in the record. It was, however, made an exhibit in the case (Exhibit C). Reference to it will show that the testimony referred to relates to statements of representatives of counties before the State board of equalization in 1901, who were not necessarily supervisors. The transcript of the record expressly so states. This was pure hearsay. (See last paragraph on page 121.)

(b.) Mr. Butterfield states (Brief, p. 14) that Commissioner Freeman testified that in the year 1902 the supervisors often admitted undervaluation. The statement is thus qualified :

"Oftentimes supervisors would *admit the result* and say 'that is about how I am assessing.' Some of them would claim that they were assessing at full value notwithstanding the data, or say to the contrary—some would claim they were assessing better than our per cents. would show them to be, not at full value, but better, and some would admit that was about right and some would claim that they were assessing already at value" (124-'5).

"That was prior to the first of June, prior to the completion of the roll" (R., 124).

(c.) Mr. Butterfield's brief (p. 14) states that Commissioner Freeman testified "that the statement contained on page 17 of Exhibit C, to the effect that the old plan of assessing

property at a percentage of its value still prevails," was true, and that (Brief, p. 15) Commissioner Dust testified to the same effect. Reference to the record (pp. 126 and 69) shows that the report referred to did not state that "the old plan of assessing property at a percentage of its value prevailed," but only that the commissioners impressed upon the supervisors that *while* that plan prevailed there would be danger of as many different percentages as supervisors in a county. This is entirely distinct from an assertion in the report of the actual existence of a system of general and intentional undervaluation.

None of the statements mentioned are evidence of such a system.

(d.) Mr. Butterfield's brief also states (p. 16) that Commissioner Dust testified that in January, 1903, the assessments of general properties were still below cash value, and that Commissioner McLaughlin testified that the answer in the Board of Education case, which stated that the undervaluation was intentional and general, was his deliberate conclusion. Commissioner Dust refuses to say that any general condition of this kind existed. Thus:

"Q. Could you give us any idea what proportion of the assessors of the State up to that time had put their assessments to what you deemed to be the true cash value and what part had not?

A. No, sir, I would not attempt to" (R., 70-71).

He further qualifies the statement as to undervaluation thus:

"A. I wouldn't want to qualify it excepting to say that if this sets out that all the undervaluation is intentional, then I do want to qualify it, because as I stated before, that some

are a mistake of judgment on the part of the assessor; some are the result of indolence and carelessness and some of it was intentional" (R., 72).

Commissioner McLaughlin discredits the answer in the Board of Education case thus:

"That expresses the opinion of a portion of the tax commission. It is stronger than I would make it according to my opinion of the situation. * * * I could subscribe to that then and the same now, but my individual judgment is that that is true in a qualified sense, but at the time I didn't think it was just exactly true, but it was the judgment of a majority of the board. * * * A. Yes, I mean that I had to do lots of things on the board that was not altogether my judgment. * * * A. I simply say that language is stronger than I would employ, because I think it gives, or it is apt to give, a wrong impression" (R., 95-96).

(e.) Mr. Butterfield's brief (p. 17) also states that Examiner Bolt "admitted that in his county and over the State generally, as far as his knowledge extended, it had been the habit to assess at a percentage of the true cash value."

Mr. Bolt's testimony expressly limited that statement to a time previous to 1902. He not only says that by 1901 his township was brought up to 100 per cent. (R., 193), but the question referred to in Mr. Butterfield's brief expressly related to a time previous to 1899.

"Q. Don't you know as a matter of fact that that is the habit as a general proposition all over the State of Michigan?

"A. To do what?

"Q. To assess property *prior to 1899* or to attempt to assess property in their townships at some percentage of the true cash value less than 100 %?

"A. That is my belief and my understanding that they

used to assess property at less than its actual value; that is, as far as my knowledge extended. I don't know what they did in the south part of the State here" (193).

2. *Comparison of Michigan Railway Appraisal of 1900 with Cooley and Adams Appraisal of 1902.*

Mr. Butterfield calls attention (Brief, p. 52) to the fact that Professor Adams' valuation of the Michigan Central for 1902 is about fourteen millions greater than that for 1900, and says "this enormous increase is due to the changes in the method of computation" adopted by Adams in 1902.

The fact is that of the fourteen millions referred to nearly eleven millions was due to the increase in *physical values* from 1900 to 1902, as to which increase there is no dispute. (See table 739-a, between pages 544 and 545 of the record). Mr. Butterfield's computation shows only that if the 1900 method (which was not intended to procure an accurate appraisal, but only to determine the fact whether railroads were paying as high a rate of taxation as other property) had been adopted for 1902, this rich road with its large, safe, and steadily increasing net earnings (remaining even after paying for permanent additions out of earnings) whose bonds and stocks have been for years above par and which, besides paying dividends without interruption and so "fattening" the road that its physical value (partly as the result of the policy referred to) increased nearly 30 per cent. in less than two years, *has no franchise or intangible value*. Nothing could better prove than does this computation of Mr. Butterfield's, the unreasonableness of applying the average earnings, interest, and tax rates used in his comparison.

3. Michigan Mileage Proportion.

Mr. Butterfield says (Brief, p. 55) that the fourteen miles of Illinois Central track from Kensington to Chicago should have been considered by Professor Adams in determining the Michigan mileage ratio. It is the undisputed testimony of Mr. Thompson that the omission was made because Mr. Burt, the auditor of the Michigan Central, "informed me that company derives no net revenue from that portion of line" (R., 612).

Appellant's expert witness, Professor Johnson, takes $68\frac{5}{10}$ per cent. as the Michigan mileage ratio (R., 671). The omission complained of is too insignificant to affect the result.

Actual Value of Michigan Central Stock.

In our brief on undervaluation, at page 137, it is stated that the Michigan Central report to the State officials gives the value of the stock as about 115. When that was written the writer believed that this item in the report was in the transcript of the record returned to this court. Such does not seem to be the fact. The report, however, was made an exhibit in the case, being Defendant's Exhibit No. 8, February 19, 1904. The fact of value is, however, otherwise shown. Treasurer Cox testified: "If you want to know the value of the total capital stock, you should take somebody that is willing to take it all, as New York Central did; they don't need it all to get control, but would like to have

it" (R., 658). The New York Central had an outstanding offer for this stock, and as late as June 30, 1901, was still buying it in at the 115 price (R., 661).

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